Supreme Court of the United States

OCTOBER TERM, 1943.

No. 159.

MRS. EULA MAY WALTON, ADMINISTRATRIX OF THE ESTATE OF FRED WALTON, DECEASED, PETITIONER,

VS.

SOUTHERN PACKAGE CORPORATION, RESPONDENT.

BRIEF FOR RESPONDENT IN OPPOSITION TO MOTION OF PETITIONER FOR LEAVE TO PROCEED IN FORMA PAUPERIS

and

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI.

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VS.

SOUTHERN PACKAGE CORPORATION, RESPONDENT.

BRIEF ON BEHALF OF RESPONDENT IN OPPOSITION TO MOTION OF PETITIONER FOR LEAVE TO PROCEED IN FORMA PAUPERIS.

MAY IT PLEASE THE COURT:

Respondent respectfully submits that petitioner's motion for leave to proceed *in forma pauperis* and that record be printed at public expense should be denied for the following reasons, to-wit:

(1) The motion is presented by the Administratrix of the Estate of Fred Walton, deceased, but does not have attached thereto affidavits of persons to be benefited that they are unable to pay costs.

(2) It does not affirmatively appear from the motion, affidavit or record that petitioner is a citizen of the United States.

(3) The motion and affidavit do not show that petitioner is entitled to the redress which she seeks.

(4) It does not appear that the motion for leave to proceed *in forma pauperis* was presented to or filed with the Supreme Court of Mississippi.

The motion and affidavit filed by petitioner refer to the heirs at law of Fred Walton, deceased. There was not presented or filed in support of said motion affidavit of any heir or heirs of Fred Walton, deceased, except the petitioner as Administratrix of the Estate. It affirmatively appears from the record that attorneys for petitioner have a definite and fixed interest in the proceeds involved in this suit (R. 53). The attorneys for petitioner do not join in the motion and no affidavit by said attorneys has been attached to or filed with said motion. Under the authorities the motion is fatally defective, and we call attention to the following:

Carter v. *Kurn*, (C. C. A. 8) 120 F. 2d 261; *Boggan* v. *Provident Life & Accident Ins. Co. of Chattanooga, Tenn.*, (C. C. A. 5) 79 F. 2d 721; *Chetkovich* v. *U. S.* (C. C. A. 9) 47 Fed. 894; *Reed* v. *Pennsylvania Company*, (C. C. A. 6) 111 Fed. 714.

Carter v. *Kurn*, *supra*, is directly in point and states the rule as follows:

> "This cause came on to be heard on the duly verified petition of John W. Carter, praying that an order be entered permitting him to prosecute the appeal without paying the cost or giving security or paying the cost of printing the record, and the motion made by the appellees to dismiss the appeal (which we treat on this hearing as resistance to the petition). The petitioner states that he qualified as administrator of the estate of Edward Stanley Harp, deceased, for the purpose of instituting the action for damages in the District Court, and that neither he personally nor as such administrator, nor any of the beneficiaries in said action, are financially able to defray the ex-

pense of printing the record, to give security for same, or to pay the cost of appeal or to give security therefor.

"The record discloses that the named decedent left five children surviving him who would be the beneficiaries in case of recovery in the action, and that the action was prosecuted by attorneys who, according to the averments of the appellees, each have a substantial interest in the recovery.

"Two points made by appellees against granting the petition are that the requirements of the applicable statute, 28 U. S. C. A., Par. 832, have not been complied with, in that (1) there is no showing that petitioner 'believes that he is entitled to the redress he seeks' and that his appeal is meritorious; (2) the several persons beneficially interested in the action have not presented poverty affidavits:

"We think both points are well taken and that the present petition to proceed *in forma pauperis* should be denied. *Where, as in this case, the action is prosecuted for the joint benefit of several persons, the petition to proceed in forma pauperis is insufficient unless each person directly interested in recovery makes the poverty affidavit required by the statute*, stating facts to show the financial inability. * * *" (Italics Ours).

In the *Boggan Case, supra*, the Circuit Court of Appeals for the Fifth Circuit announced the rule as follows:

"* * * The statute under which the appeal is prosecuted is a statute of grace. It extends to those embraced in it, but only to those. *Quittner* v. *Motion Picture Producers & Distributors*, (C. C. A.) 70 F. 2d 331, the privilege of prosecuting, without paying or securing the costs, appeals which are substantially meritorious, and which, because of the appellant's poverty, could not be prosecuted if bond or security were required. *It may not be used by persons not poor persons, in whose interest, though not parties to the suit, the litigation is being conducted, to prosecute an appeal without giving bond or costs.* * * *" (Italics Ours).

In *Chetkovich* v. *United States*, *supra*, the Court said:

> "The affidavit in support of the application for leave to prosecute the appeal in this case *in forma pauperis* avers:
>
> > 'There is no person interested by contract or otherwise in the said cause of action or entitled to share in the recovery thereunder who is able to pay or secure said fees or costs.'
>
> Such an affidavit is insufficient. In cases of this kind the affidavit must be made by every person interested in the recovery, *including the attorney, if he has a direct interest in the result of the action. United States* v. *Ross*, (C. C. A.) 298 Fed. 64, and cases therein cited" (Italics Ours).

Unless both the heirs of the Estate and the attorneys make the required pauper's affidavit petitioner is not entitled to proceed *in forma pauperis* under the statute. It is apparent that the motion should be denied.

In addition, the benefits of 28 U. S. C. A., Sec. 832, cannot be claimed by anyone other than a citizen of the United States. It does not affirmatively appear from either the motion, the affidavit or the record that petitioner is a citizen of the United States and for this reason the motion should be denied. *Volk* v. *B. F. Sturtevant Co.*, 99 Fed. 532, affirmed 104 Fed. 276; *De Maurey* v. *Swope*, 180 F. 2d 530; *Johnson* v. *Nickoloff*, 52 F. 2d 1074; *Austin* v. *United States*, (D. C. Ill.) 40 Fed. Supp. 777.

In addition, no attempt is made by petitioner in her motion or affidavit for leave to proceed *in forma pauperis* to show a meritorious right to have a Writ of Certiorari issued in this cause. A showing on behalf of petitioner that she is entitled to the redress sought is a condition precedent to her right to proceed *in forma pauperis*. Having failed so to do, her motion should be denied. *Stewart* v. *St. Sure*, (C. C. A. Cal.) 109 F. 2d 162, certiorari denied 309 U. S. 653, 60 S. Ct. 470, 84 L. Ed. 1003, rehearing

denied 309 U. S. 696, 60 S. Ct. 588, 84 L. Ed. 1036; *Smith* v. *Johnston*, 109 F. 2d 152; *Fisher* v. *Cushman*, (C. C. A., Wash.) 99 F. 2d 918; *De Groot* v. *United States*, (C. C. A., Alaska) 88 F. 2d 624; *Kelly* v. *Johnston*, (C. C. A., Cal.) 99 F. 2d 582.

Petitioner seeks permission to proceed *in forma pauperis* in her attempt to persuade this Court to review a decision of the Supreme Court of Mississippi. 28 U. S. C. A., Sec. 832, requires the petition or motion to be allowed to proceed *in forma pauperis* to be presented to the trial court or to the court from which an appeal is sought in order for that court to pass on the merit of the proposed appeal. It does not appear that petitioner's motion to proceed *in forma pauperis* was presented to the trial court or to the Supreme Court of Mississippi. *Waterman* v. *McMillan*, (U. S. C. A., D. C.) 135 F. 2d 807; *Bayless* v. *Johnston*, 127 F. 2d 531.

Respondent respectfully submits that the motion to be allowed to proceed *in forma pauperis* should be denied.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI.

POINT I.

The Petitioner Was Not Engaged in an Occupation Necessary to the Production of Goods for Commerce Within the Fair Labor Standards Act, or Not Engaged in the "Production of Goods for Commerce."

STATEMENT.

The Southern Package Corporation was engaged in the business of manufacturing lumber and veneer products, a substantial portion of which are shipped out of the State of Mississippi. The petitioner was employed in one of the respondent's plants situated in Claiborne County, Mississippi, as a night watchman. He brought suit in the Circuit Court of Claiborne County, Mississippi, for wages, liquidated damages, and attorney's fees under the Act of Congress referred to.

In his declaration the petitioner alleged that he was employed as a night watchman in respondent's plant and assigned to several other minor duties. The case was tried on an agreed statement of facts, wherein the following stipulation was contained:

> "That the plaintiff's decedent, Fred Walton, was, on the 14th day of August, 1939, an adult resident citizen of Port Gibson, Claiborne County, Mississippi, and on or about said date approached the defendant and sought employment as a night watchman at its Port Gibson plant. That the defendant, thereupon, employed said Fred Walton as a night watchman at said plant. That said plant did not operate at night during the period of the employment of plaintiff's intestate, but did when business required it to operate at night during other periods; and the defendant was not engaged in the actual production of goods for interstate

commerce during the period of time that said Fred Walton was on duty. Fires were kept under the boilers in said plant during the night by a fireman on duty for said purpose. Occasionally, repairs were made to the machinery at night by employees other than said Fred Walton. It was the duty of said Walton, as night watchman at said plant, to make an hourly round of the plant and punch a night watchman's clock located at various stations on said plant and to report any fires and trespassers. A record thereof was preserved, and Walton's services were rendered primarily for the purpose of reducing the fire insurance rates or premiums upon the buildings, machinery, and fixtures situated on said premises. *Except for the reduction obtained in said insurance rates, a night watchman would not have been employed, and such services were not necessary nor used in connection with the actual production of veneer or other timber products for shipment in interstate commerce, and said Walton performed no service in connection with the actual manufacturing of veneer or other products.*"

The petitioner recovered a judgment in the trial court, and on appeal the Supreme Court of Mississippi reversed the judgment and the suit was dismissed. The case is reported in 11 So. 2d 912, *Southern Package Corporation* v. *Walton*, and presents the question as to whether or not the petitioner, under the facts shown in the record, was engaged in producing goods for commerce, or engaged in an occupation necessary to the production of goods for interstate commerce so as to be entitled to the benefits of the Fair Labor Standards Act of 1938.

ARGUMENT.

Sec. 206 of 29 U. S. C. A. provides in part as follows:

Minimum Wages, Effective Date.

"(a) Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates" * * *

Sec. 203 (j) of 29 U. S. C. A. defines "produced" as follows:

Definitions.

* * * "(j) 'Produeed' means produced, manufactured, mined, handled, or in any other manner worked or in any State; and for the purposes of this chapter an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof in any State."

In order that an employee shall be subject to this Act, it must appear not merely that the employer is engaged in producing goods for shipment in interstate commerce or otherwise engaged in Interstate commerce, but it is also necessary that the particular employee involved be employed in the performance of some duty either in interstate commerce or in some process constituting a part of the production of goods for interstate commerce. It is quite evident that Fred Walton, while serving as a night watchman for the appellant, was not engaged in interstate commerce nor was he engaged in the production of goods or in any process incident to the production of goods in the usual sense. The only possibility of the services of said night watchman coming within the terms of the Act is by reason of the somewhat unusual definition of the term "produced," which includes not only things which are commonly and usually understood to be within the meaning of said term, but also includes employment "in any process or occupation *necessary* to the production thereof" (Italics Ours). The question then arises as to whether or not the services rendered by a night watchman under said circumstances were necessary to the production of goods to be shipped in interstate commerce.

The Supreme Court of Mississippi was of the opinion that under the facts in this record the petitioner did not

come within the Act of Congress involved; but that the question of his compensation was one within the state law. The Court used the following language:

"Thus, it will be seen that the portion of the language which is to be construed in determining whether the act is to be applied to the employment of the night watchman in the case at bar are the words 'or in any process or occupation necessary to the production thereof, in any State,' since he was manifestly not engaged in producing, manufacturing, mining, handling, transporting or in any other manner working on such goods.

"In adopting the foregoing and rather unusual definition of the term 'produced,' as related to the production of goods for interstate commerce, so as to include among those engaged in such employment also those in any occupation 'necessary' to the production of such goods, it should be presumed that the Congress thus enlarged the meaning of the term as far as it was deemed expedient. Although numerous terms used in the act are specifically defined therein, the meaning of the word 'necessary' was left intact as found in Webster's Dictionary—'Essential to a desirable projected end or condition; not to be dispensed with without loss, damage, inefficiency or the like; as, a necessary tool.' Moreover, unless the term 'any occupation necessary to the production thereof' is to be given an expanded meaning by judicial construction, it may be confidently asserted that under the agreed statement of facts in the instant case, the act would have no application, since the work of this employee had only the most tenuous relation, and was not in any sense 'necessary' to the production of goods by this employer for commerce. Presumably the night watchman slept during the daytime, while the other employees were engaged in the production of the goods for commerce. He contributed nothing to such work of production, nor to enable those engaged in production to more efficiently perform their duties. No more goods were produced by reason of his employment, and he would no doubt have been kept on duty for the purpose for which he was employed even if it had been necessary to close

down the plant for an indefinite period because of a break-down, or on account of other incidents interfering with its continued operation. If the plant had been running at night, the services of a night watchman would not have been required at all, even to satisfy the request of the insurance company."

In giving the history of the Act, the Court used the following language:

"The legislative history mentioned in *Jewel Tea Co. v. Williams, supra*, relating to the enactment of the Fair Labor Standards Act, discloses that the conference draft of the bill, which was finally enacted into law after the Senate had refused to accede to the House amendment, which broadened the coverage of the bill by requiring time and a half for overtime for all employees of an 'employer engaged in commerce in an industry affecting commerce,' restored the test of coverage contained in the original Senate bill, and that Senator Pepper of Florida, a member of the Conference Committee, which prepared the Act as adopted, said, in answer to an objection to the broad scope of the Act, 'I want it distinctly stated that this proposed law is not applicable to all employees of an industry which itself is engaged in interstate commerce. It is applicable only to those employees who themselves are engaged either in interstate commerce, or the production of goods for interstate commerce, and the contrary theory was definitely rejected by the Committee.' 83 C. R. 9168 (Senate—75th Cong., 3rd Sess. June 14, 1938); also, *Jax Beer Co. v. Redfern*, 5 Cir., 124 F. 2d 172."

Petitioner's counsel rely upon the case of *Kirschbaum v. Walling*, 316 U. S. 517, 86 L. Ed. 1638, Cases Nos. 910 and 924, October, 1941, Term of this Court, No. 110 before the Circuit Court of Appeals, 124 F. 2d 967, and is reported in 38 Fed. Supp., page 204. Case No. 924 is reported in 125 F. 2d 207.

This Court in stating the activities of the employees involved, used the following language:

"These employees perform the customary duties of persons charged with the effective maintenance of a loft building. The engineer and the firemen produce heat, hot water, and steam necessary to the manufacturing operations. They keep elevators, radiators, and fire sprinkler systems in repair. The electrician maintains the system which furnishes the tenants with light and power. The elevator operators run both the freight elevators which start and finish the interstate journeys of goods going from and coming to the tenants, and the passenger elevators which carry employees, customers, salesmen and visitors. The watchmen protect the buildings from fire and theft. The carpenters repair the halls and stairways and other parts of the buildings commonly used by the tenants. The porters keep the buildings clean and habitable."

As Judge Frankfurter stated in the majority opinion in the last mentioned case, the determination of the question depends upon the facts in each particular case. The question as to the status of an employee occupying the position of a night watchman is a mixed question of law and fact, and must be determined from the facts in each case.

We call your Honors' attention to the fact that in the case of *Arsenal Building Corporation* v. *Walling*, being Case No. 924, referred to above, the record indicates that there was no watchman involved at all. We have carefully read the case as reported from the District Court, as well as the Circuit Court of Appeals, and no statement is made that a watchman was involved at all.

The case of *Fleming* v. *A. B. Kirschbaum Company*, cited on page 9 of the appellee's brief and decided by the District Court of Eastern Pennsylvania on April 2, 1941, appears to be reported in 38 Fed. Supp. 204. This case involved the question of whether or not the Act was applicable to such employees. The duty of such employees was stated by the Court as follows:

"As part of the consideration for the rent, the defendant furnishes the services of three elevator operators, two watchmen, three firemen, an engineer, a carpenter and a carpenter's helper, and a porter or cleaner, all of whom are employed and paid by it. It also employs a cashier and bookkeeper who are not involved in this proceeding. The elevator operators carry both passengers and freight in varying ratios between the several floors of the building. *The watchmen pass through the building, closing windows, putting out lights, guarding against fires, etc.* The engineer supervises the operation of the boilers, which produce steam used by some of the tenants in their manufacturing operations, the various pumps in the building, and the production of direct electric current which is used to light the building and is also used by two of the tenants; he also keeps the elevators in proper working order and takes care of the sprinkler tank. The firemen fire the boilers and occasionally supervise the running of the pumps when the engineer is called to another part of building. The carpenter replaces sash chains, repairs the doors of the building and paints the common hallways, staircases, etc."

It will be noted that the watchman's duty in the above case was not limited merely to the usual duties of a watchman, but that he had duties with respect to maintaining the building, such as closing windows, putting out lights, etc.

The Supreme Court of Mississippi in its opinion called attention to the fact that in every reported case where the status of a watchman was involved, such employee was charged with some additional duty of sufficient importance to bring the employee within the statute. And while the Court in its opinion in the Kirschbaum case does not expressly so state, the Court must have been impressed with the fact that the record disclosed that the watchman in that case had other and responsible duties. Not only that, but aside from the fact that the record in No. 924 does not disclose that a watchman is involved, the

cases presented a very different state of facts from the facts shown in this record. There we have two buildings in urban communities, in which the lessees were manufacturing merchandise calculated to attract thieves and thefts. They were situated in large cities, surrounded by organized crime, for which reason doubtless the lessee required the lessor to provide a watchman. It appears that the operations continued there at night, that divers and sundry persons were going in the buildings and the merchandise was exposed to theft, and that the watchmen were on duty at night.

In the present case we have a wood-working plant in a small suburban community manufacturing commodities not at all attractive to theft. The watchman was only on duty at night. The plant was not under operation at all at that time. The duties of the watchman were to walk through the building every hour during the night and make record of the fact that he had done so by registering in the appliance provided for that purpose, in his routine travels through the building.

It was his duty to watch the building and report fire or trespassers. He was charged with no other duty in respect to fire and trespassers. Upon making his rounds through the building, which he was required to do each hour, he then had no other duties to perform, and he could retire, relax, or do anything he pleased, go to sleep, if he felt like it. In other words, his duties were that of a watchman with the most limited authority and duties.

We further call the attention of the Court to the fact that the night watchman was not necessary to the production of goods in commerce, that his presence involved only a question of fire insurance rates, and it was expressly agreed by the petitioner in this case, as follows:

> "Except for the reduction obtained in said insurance rates, a night watchman would not have been employed, and such services were not necessary nor

used in connection with the actual production of veneer or other timber products for shipment in interstate commerce, and said Walton performed no service in connection with the actual manufacturing of veneer or other products."

The authorities are well settled that an employee does not fall within the provisions of the act unless the services are necessary for production in interstate commerce; that the same fact that the services may affect interstate commerce or may be a unit of interstate commerce is not sufficient.

It is further held that the burden of proof is upon the petitioner to show by preponderance of the evidence that the services of petitioner fall within the provisions of the act.

The following authorities are directly in point:

Warren-Bradshaw Drilling Company v. *Hall*, 317 U. S. , 63 S. Ct. 123, 87 L. Ed. . It was held that the burden of proof was upon the employee to show a state of facts entitling him to recover.

In the case of *Walling* v. *Jacksonville Paper Company*, 87 L. Ed. 393, the court, at page 397, used the following language:

> "As to the balance, we do not think the Administrator has sustained the burden which is on a petitioner of establishing error in a judgment which we are asked to set aside."

On the same page, beginning at the bottom of Column 1, the following language is used:

> "In this connection we cannot be unmindful that Congress in enacting this statute plainly indicated its purpose to leave local business to the protection of the states. S. Rep. No. 884, 75th Cong., 1st Sess., p. 5; 83 Cong. Rec., 75th Cong., 3d Sess., Pt. 8, p. 9169. Moreover as we stated in *A. B. Kirschbaum Co.* v. *Walling*, *supra* (316 U. S., pp. 522, 523, 86 L. Ed.

1646, 1647, 62 S. Ct. 1116], Congress did not exercise in this Act the full scope of the commerce power. We may assume the validity of the argument that since wholesalers doing a local business are in competition with wholesalers doing an interstate business, the latter would be prejudiced if their competitors were not required to comply with the same labor standards. That consideration, however, would be pertinent only if the Act extended to businesses or transactions 'affecting commerce.' But as we noted in the Kirschbaum case the Act did not go so far."

In the case of *Ansel Higgins* v. *Carr Brothers Company*, 87 L. Ed. (Advance Sheets) 398, the court used the following language:

"Petitioner in his brief described the business in somewhat greater detail and seeks to show an actual or practical continuity of movement of merchandise from without the state to respondent's regular customers within the state. But here, unlike *Walling* v. *Jacksonville Paper Co.*, there is nothing in the record before us to support those statements not to impeach the accuracy of the conclusion of the Supreme Judicial Court of Maine that, when the merchandise coming from without the state was unloaded at respondent's place of business its 'interstate movement had ended.' Some effort is made to show that the court below applied an incorrect rule of law in the sense that it gave the Act too narrow a construction. In that connection it is argued that respondent is in competition with wholesalers doing an interstate business and that it can by underselling affect those businesses and their interstate activities. As we indicated in *Walling* v. *Jacksonville Paper Co.*, that argument would be relevant if this Act had followed the pattern of other federal legislation such as the National Labor Relations Act (see 29 U. S. C. A. Sec. 152 (7), Sec. 160 (a)), and extended federal control to business 'affecting commerce.' But as we pointed out in *A. B. Kirschbaum Co.* v. *Walling*, 316 U. S. 517, 86 L. Ed. 1638, 62 S. Ct. 1116, this Act did not go so far but was more narrowly confined.

"This petitioner has not maintained the burden of showing error in the judgment which he asks us to set aside."

In the case of *Pederson* v. *Delaware, L. & W. R. R. Co.*, 229 U. S. 146, 57 L. Ed. 1125, 33 S. Ct. 648, it was held that an employee to come within the act must be indispensable to the carrying on of interstate commerce.

In the case of *Overstreet* v. *North Shore Corporation*, (Advance Sheets) 87 L. Ed. 423, where the employee was engaged in operating a toll road and bridge in interstate commerce, it was held that such person was within the act, using the following language:

"We think that practical test should govern here. Vehicular roads and bridges are as indispensable to the interstate movement of persons and goods as railroad tracks and bridges are to interstate transportation by rail. If they are used by persons and goods passing between the various states, they are instrumentalities of interstate commerce. Cf. *Covington & C. Bridge Co.* v. *Kentucky*, 154 U. S. 204, 218, 38 L. Ed. 962, 14 S. Ct. 1087, 4 Inters. Com. Rep. 649. Those persons who are engaged in maintaining and repairing such facilities should be considered as [illegible]gaged in commerce' even as was the bolt carrying employee in the Pederson case, 229 U. S. 146, 57 L. Ed. 1125, 33 S. Ct. 648, Ann. Cas. 1914C, 153, 3 N. C. C. A. 779, *supra*, because without their services these instrumentalities would not be open to the passage of goods and persons across state lines. And the same is true of operational employees whose work is just as closely related to the interstate movement. Of course, all this is subject to the qualification that the Act does not consider as an employer the United States or any State or political subdivision of a State, and hence does not apply to their employees. Sec. 3 (d)."

In the case of *McLeod* v. *Threlkeld*, decided June 7th, 1943, the Court decided that the cook of a contractor furnishing meals to railroad employees of an interstate carrier was not engaged in interstate commerce, using the following language:

"Such a ruling under the Federal Employers' Liability Act, after the *Bolle, Industrial Commission* and *Bezue Cases, supra*, note 9, should not govern our conclusions under the Fair Labor Standards Act. These three later cases limited the coverage of the Federal Employers' Liability Act to the actual operation of transportation and acts so closely related to transportation as to be themselves really a part of it. They recognized the fact that railroads carried commerce and were thus a part of it but that each employment that indirectly assisted the functioning of that transportation was not a part. The test under this present act, to determine whether an employee's activities affect or indirectly relate to interstate commerce but whether they are actually in or so closely related to the movement of the commerce as to be a part of it. Employee activities outside of this movement, so far as they are covered by wage-hour regulations, are governed by the other phrase 'production of goods for commerce.'"

In the case of *United States* v. *Railroad Co.*, 220 Fed. 215, it is held that the word "necessary" means more than merely convenient. Webster's Dictionary defines the word "necessary" as follows:

"Essential to a desirable or projected end or condition; not to be dispensed with without loss, damage, inefficiency or the like, as, a necessary tool."

Other cases denying the right of a night watchman to recover under the act are as follows:

Hart v. *Gregory*, 220 N. C. 180, 16 S. E. 837; *Rogers* v. *Glazer*, 32 Fed. Supp. 990; *Brown* v. *Bailey*, 177 Tenn. 185, 145 S. W. 2d 105; *Brown* v. *Carter Drilling Co.*, 38 Fed. Supp. 489; *Dotson* v. *Stowers*, 37 Fed. Supp. 937; *Bowman* v. *Pace Company*, 119 F. 2d 858.

We respectfully submit that the facts in this case are insufficient to show that the Supreme Court of Mississippi committed error in holding that the petitioner was not entitled to recover.

POINT II.

Cause of Action Did Not Survive.

A.

The Federal Statute Does Not Provide for Survival of Suit under the Wage and Hour Law.

The cause of action sued on exists solely by virtue of the Federal statute, U. S. C. A. 29, Par. 216.

We, therefore, quote this Section in full:

"216. Penalties; civil and criminal liability.

"(a) Any person who willfully violates any of the provisions of section 215 shall upon conviction thereof be subject to a fine of not more than $10,000, or to imprisonment for not more than six months, or both. No person shall be imprisoned under this subsection except for an offense committed after the conviction of such person for a prior offense under this subsection.

"(b) Any employer who violates the provisions of section 206 or section 207 of this chapter shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. *Action to recover such liability* may be maintained in any court of competent jurisdiction *by any one or more employees* for and in behalf of himself or themselves and other employees similarly situated, or such employee or employees may designate an agent or representative to maintain such action for and in behalf of all employees similarly situated. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action. June 25, 1938, Ch. 676, 816, 52 Stat. 1069" (Italics Ours).

It will be noted that the above mentioned section nowhere provides for the survival of the cause of action

after the employee's death. There is no other provision either of the Federal Wage and Hour Law or in any other Federal statute providing for the survival of this cause of action. There is no general Federal statute providing for survival of causes of action. Counsel for plaintiff has not insisted that the cause of action survive by virtue of either the Federal statute on Wage and Hours, and any other Federal statute.

Also, see 25 C. J., p. 220. The statute having expressly enumerated the persons who could "maintain" the cause of action created solely by an existence of the statute this enumeration would have the effect of preventing the maintenance of such a suit by anyone else. Such an action can be maintained only by an employee or his designated agent.

B.

Assuming the Federal Statute to Be Silent As to Survival, the Common Law As It Existed at the Time of Its Adoption in America Would Control.

Counsel for the plaintiff states the above mentioned rule in the following language:

> "The general rule is that a cause of action given by a federal statute, if no specific provision is made by act of Congress for its survival, survives or not according to the principles of the common law existing in England at the time of the formation of the Union."

We are inclined to agree with the foregoing statement of the rule.

However, in applying the rule, counsel for the plaintiff has overlooked the recent decision of *Erie* v. *Tompkins*, 304 U. S., p. 64, 82 L. Ed., p. 1188, in which Judge Brandeis says, "there is no federal general common law," and expressly overruled *Swift* v. *Tyson*, 16 Peters, p. 1, 10 L. Ed. 856, and the cases following this.

The Mississippi statute with reference to survival in Sections 1712-14, Code of 1930, would have no application.

This is correctly stated by counsel for the plaintiff who cites the case of *Schrieber* v. *Sharpless*, 28 L. Ed. 65. We have examined this case very carefully and find that it holds that the survival of the cause of action under the Federal statute depends upon the common law as of the formation of the Union, and that a statute on survival of actions subsequently adopted by one of the States has no application. Of course, the Mississippi statute was adopted to relieve parties from the rigor of the common law with respect to survival of causes of action, and the statute permits the survival of many causes of action that did not survive under the common law, as it existed at the time of the formation of the Union.

C.

This Cause of Action Arises Out of an Alleged Tort and Is Not a Suit for Breach of a Contract.

Plaintiff's counsel insists that the suit is for breach of a contract. The only authority cited in support of this view is the case of *Cole* v. *Harker* (W. D. Tenn.). Although this case is alleged to have been decided October 10, 1939, counsel states in his brief that it is "not yet reported." Since October 10, 1939, there have been approximately eleven columns of the Federal Supplement published, and if this case has not yet been reported, it is very unlikely that it ever will be reported. We also have made a careful search of the reported cases and are unable to locate whether this case has been reported, and naturally would be unable to comment upon what the case held on the soundness of the reasoning supporting the same. At any rate, it was a decision of a "one man court" and evidently was not regarded as being of sufficient importance to justify it being incorporated in the reports.

In the case of *Terner* v. *Clickstein & Terner, Inc.*, 283 N. Y. 299, 28 N. E. 2d 846 (N. Y., 1940), the Appellate Court of the State of New York, in dealing with a suit

under the Fair Labor Standards Act for additional wages and overtime, held that the jurisdiction was in a court of law and not equity, and that the nature of the action was that of a tort and not a breach of a contract, using the following language:

> "*The primary right arises from a tort and the right of action is not dependent upon any equitable feature or incident* (Pomeroy's Eq. Juris. (4th Ed.), p. 178). Under such conditions, an action in equity will not lie" (Italics Ours).

The theory that the law becomes a part of the contract has been definitely discarded in the case of *St. John v. Brown et al.*, (N. D. Texas, Fort Worth Division, March 28, 1941) 38 Fed. Supp. 385, wherein the following language was used:

> "Though this law was in effect, the employment contract was made without reference to it. * * * Here, extra pay for overtime is a thing the law demands. Whatever that per hour contractual rate is figured to be is the rate Congress had in mind when it said, 'not less than one and one-half times the *regular rate* at which he is employed.' *The law did not become a part of these contracts.* * * * The law exacts certain things and forbids others, *and fixes civil and criminal penalties for its violation.* Even the 'one and one-half times' provision is akin to a penalty, intended to discourage overtime employment and to encourage a greater spread of employment. * * *" (Italics Ours).

D.

Cause of Action Does Not Survive under Common Law.

Under the common law as it originally existed the general rule was that causes of action based upon a contract would survive, but that causes of action based upon a tort would not survive. In order to broaden this rule the statute of 4 Edward III, Chapter 7, was enacted. This statute and its effect is stated in the case of *Moore v. Backus*, 78 F. 2d 571 (573), in the following language:

"For many centuries the *maxim actio personalis moritur cum persona* applied to all tort actions. In the fourteenth century, however, the English statute of 4 Edward III, Chapter 7, was enacted, which limited and became a part of the common law. That statute is the basis of this controversy and reads as follows:

> "Whereas in times past executors have not had actions for the trespass done to their testators, as of the goods and chattels of the same testators carried away in their life, and so such trespasses have hitherto remained unpunished; it is enacted that the executors in such cases shall have an action against the trespassers to recover damages in like manner as they, whose executors they be, should have had if they were in life' (Quoted in Pollock on Torts (11th Ed.), p. 66)."

There was no other statute enacted in England relating to the subject of survival of causes of action prior to the formation of the American Union.

It will be noted that the foregoing statute was intended to apply primarily to suits for conversion of specific, tangible personal property wherein the estate of the decedent had been damaged and that of the defendant enriched.

The early decisions under the common law were thoroughly reviewed in the cause of *Sullivan* v. *Associated Bill Posters, etc.*, 6 F. 2d 1000 (1004, 1007), in the following language:

> "It was a rule of the common law that most causes of action based on contract survived, while most of those founded on tort abated. But the rule was subject to various exceptions. The real test, so far as tort actions were concerned, seems to have been whether the injury on which the cause of action was based affected property rights, or affected the person alone. In the former case the cause of action survived, while in the latter it abated. See 21 Encyc. of Pl. & Pr. 31. The common-law rule, as laid down in 3 Blackstone's Comm. 302, is as follows:

'* * * The death of either party is at once an abatement of the suit. And in actions merely personal, arising *ex delicto* (from wrong done), for wrongs actually done or committed by the defendant, as trespass, battery, and slander, the rule is that *actio personalis moritur cum persona* (a personal action dies with the person); and it shall never be revived either by or against the executors or other representatives. For neither the executors of the plaintiff have received, nor those of the defendant have committed, in their own personal capacity, any manner of wrong or injury.'

"In *Hambly* v. *Trott*, Comp. 371, 376, which was decided in 1776, Lord Manfield, discussing the maxim above quoted, declared that it was not generally true and much less universally so. The question in that case was whether an action of trover could be maintained against an executor for a conversion by his testator. The case was twice argued before the court, and at its conclusion it was said: 'Cur. advisari vult.' On a subsequent day Lord Mansfield delivered the unanimous opinion of the court, in which he said:

'Here therefore is a fundamental distinction. If it is a sort of injury by which the offender acquires no gain to himself at the expense of the sufferer as beating or imprisoning a man, etc., there the person injured has only a reparation for the *delictum* in damages to be assessed by a jury. But where, besides the crime, property is acquired which benefits the testator, there an action for the value of the property shall survive against the executor. As, for instance, the executor shall not be chargeable for the injury done by his testator in cutting down another man's trees, but for the benefit arising to his testator for the value of sale of the trees he shall. So far as the tort itself goes, an executor shall not be liable; and therefore, it is that all public and all private crimes die with the offender, and the executor is not chargeable; but, so far as the act

> of the offender is beneficial, his assets ought to be answerable, and his executor therefore shall be charged.' "

If "specific property" is acquired, the court held the cause of action survives; if otherwise, the court held that it does not.

In 1 C. J. 185, it is said:

> "In order that a right of action arising out of a tort should survive against the executor or administrator of the tort-feasor, it was generally held essential that the latter should, by the wrongful act, have acquired specific property by which, or by the proceeds of which, the assets in the hands of his personal representatives were increased. It was not enough that the benefit resulted or that expense was saved to the tort-feasor by which his estate was larger than it otherwise would have been."

In the case now before the court it does not appear that the deceased defendant has in his estate any of the plaintiff's property. Assuming as we must the allegations of the complaint to be true, they amount to a claim that the estate of the defendant has been increased by profits made by the defendants wrongfully diverted from the plaintiff. So far as the injury done to property is concerned, it is indirect and consequential, and, the action being *ex delicto*, under the foregoing authorities it would not survive against the personal representatives. And even if it were shown that one's property was actually diminished, and not merely that he was prevented from increasing it by gains he otherwise would have made, the action would not survive. For the test of survivability does not turn on the fact that one's estate has been diminished. Thus in *Henshaw* v. *Miller*, 58 U. S. 211, 15 L. Ed. 222, it was held an action brought to recover damages for fraudulently recommending a third party as worthy of credit whereby financial loss resulted and one's

estate was diminished did not survive, either at common law or under the statute of Virginia.

The entire theory of the Wagner Act prohibiting the issuance, except in certain instances, of injunctions in restraining orders by the Federal Court in labor disputes is based upon the theory that labor is not property and that a labor contract is not an article of commerce. As stated in the case of *Sullivan* v. *Associated Bill Posters, etc.*, 6 F. 2d 1000 (1012),

> "they did not diminish the plaintiff's 'property' which was something already acquired. That which it hoped to acquire, but had not yet obtained, certainly did not constitute its 'property' within the meaning of the statute, and so did not survive."

E.

Cause of Action Does Not Survive under Mississippi Decisions.

We have heretofore called attention to the fact that the Mississippi statutes on this subject have no application. These statutes were passed to increase the kinds of action that would survive under the common law, and the fact that the statutes have no application militates against the theory of survival instead of assisting it. Prior to the adoption of the statute causes for personal injury did not survive.

However, under the Mississippi decisions, special attention is called to the case of *McNeely* v. *City of Natchez*, 148 Miss. 268, 114 So. 484, holding that a cause of action for a penalty for failure to secure a franchise from the City of Natchez to operate a ferry did not survive; and the case of *Catchings* v. *Hartman*, 178 Miss. 672, 174 So. 553, holding that cause of action for libel and slander did not survive the death of the plaintiff.

The McNeely case very clearly holds that a cause of action for a penalty does not survive. In a subsequent division of this brief, we deal with the question of

whether or not the alleged benefits constituted a penalty and will not attempt to go into that question at this time as it would constitute repetition.

The McNeely case and Catchings case are interesting only in that they indicate that the courts of this state have not been inclined to expand the common law on the subject of a survival of causes of actions. We quote from the case of *Catchings* v. *Hartman*, *supra*, as follows:

> "(1, 2) It is conceded, as it must be, that common law causes of action for slander or libel do not survive the death of either the wrongdoer or the person injured, wherefore, if there be any such survival, it must be by force of a sufficient statute. The question, therefore, is whether an action of slander is within the term 'personal action' as used in the above-quoted statute. In *McNeely* v. *City of Natchez*, 148 Miss. 268, 274, 114 So. 484, 487, it was held that this statute, being in derogation of the common law, must be strictly construed, and that the term 'personal action' must be interpreted according to its strictly technical meaning; and the court thereupon, so interpreting the meaning, held that a personal action, under the said statute, is one 'brought for the recovery of personal property, for the enforcement of some contract, or to recover damages for its breach, or for the recovery of damages for the commission of an injury to the person or property.'"

POINT III.

Action Is Barred by One-Year Statute of Limitations.

It is well settled that this action would be controlled by the statute of limitations of the State of Mississippi. See *Wilkinson* v. *Swift & Co.*, (U. S. D. C. N. Texas, 1941) Vol. 1, Wage and Hour Cases, 604; *Cline* v. *Super-Cold S. W. Co.*, (U. S. D. C. N. Texas, 1941) 1 W. H. Cases, 777; *Klotz* v. *Ippolito*, (U. S. D. C. S. Texas, 1941) 40 Fed. Supp. 422; *Littleton* v. *White Motor Company*, (U. S. D. C. N. Texas, 1941) 1 W. H. Cases 914; *Duncan* v. *Montgomery*

Ward & Co., Inc., (U. S. D. C. S. Texas, 1941) 42 Fed. Supp. 879; *Owen* v. *Liquid Carbonic Corporation*, (U. S. D. C. S. Texas, 1941) 42 Fed. Supp. 774; *Collins* v. *Hancock*, (La. First Judicial District Court, 1941) 1 W. H. Cases 1117.

The Mississippi statute applicable is Section 2301, which reads as follows:

> "2301. Action for penalty commenced in one year. —All actions and suits for any penalty or forfeiture on any penal statute, brought by any person to whom the penalty or forfeiture is given, in whole or in part, shall be commenced within one year next after the offense was committed, and not after."

The most recent pronouncement upon this question is that of *State for Use of Rogers* v. *Newton*, 191 Miss. 611, 3 So. 2d 816, in which the court, speaking through Chief Justice Smith, said in part:

> "On a former appeal herein, *National Surety Corporation et al.* v. *State for Use of Rogers*, 189 Miss. 540, 198 So. 299, 302, one of the questions presented was whether Mrs. Rogers had the right to sue on the certificates. The appellant's contention there was that the liability imposed by the statute is a penalty and therefore the right to recover it is not assignable. The court held that it is a penalty and not assignable under the general law, but that the statute itself confers the right upon any holder of any such pay certificates to sue thereon. This liability imposed by the statute was there referred to five separate times as a 'penalty.' On return of the case to the court below, the appellees plead the limitation of Section 2301, Code of 1930, which provides that:
>
> > 'All actions and suits for any penalty or forfeiture on any penal statute, brought by any person to whom the penalty or forfeiture is given, in whole or in part, shall be commenced within one year next after the offense was committed, and not after.'

"The Court, as it should have done, followed our former opinion and held that the liability here imposed on the superintendent to be a penalty and, therefore, as more than a year had elapsed since the cause of action accrued, it was barred by limitation.

"(2-4) Leaving out of view the law of the case rule and expressing no opinion as to its applicability *vel non* here, the question presented is whether this Court should now depart from its holding on the former appeal herein and hold this liability not to be a penalty. We shall assume, though the fact may be otherwise, that the words 'penalty' and 'forfeiture' are used in Section 2301, Code of 1930, as being synonymous and interchangeable.

"In our opinion on the former appeal herein, to which we adhere, it was said that 'this statute is highly penal.' An examination of the statute discloses that this is in accord with the legislative intent. Its sanctions are designated as penalties in its title, which sets forth that its purpose, among other things, is 'to regulate the expenditure of school funds in the several counties and separate school districts; to restrict the amount of such expenditures to amount of revenue available therefor; and to provide penalties for violations of the provisions of this act.' Two penalties are imposed by Section 14 of the Act on County superintendents of education to punish them for, and to deter them from, violating the Section: (1) Payment of the face value of pay certificates wrongfully issued; and (2) fine and imprisonment or both for the violation of any of the provisions of the section. That the first is not payable to the State, but to the holder of the certificate does not take it out of the penal category. *Bank of Hickory* v. *May*, 119 Miss. 239, 80 So. 704; 59 C. J. 11; 25 C. J. 1149, 1178. This fact is recognized by Section 2301 of the Code hereinbefore set out, which applied only to penalties and forfeitures payable to individuals. But, it is said that this provision of the statute is remedial and not penal. The title of the statute, in this connection, refers only to penalties and does not remotely indicate that any of its provisions are simply remedial. But that aside, a remedial statute is one that cures defects in, or

enlarges or abridges the scope of, a former law. 1 Blackstone's Com. 86; 59 C. J. 1106; 25 R. C. L. 765. *E. g.*, a statute that grants a theretofore non-existent remedy for a wrong inflicted. *Metzger et al.* v. *Joseph*, 111 Miss. 385, 71 So. 645. A statute that makes a wrong-doer liable to the person wronged for a fixed sum without reference to the damage inflicted by the commission of the wrong is penal. *Bank of Hickory* v. *May*, *supra*; *Gulf & S. I. R. Company* v. *Laurel, etc., Co.*, 172 Miss. 630, 158 So. 778; 159 So. 838; 160 So. 564; *O'Sullivan* v. *Felix*, 233 U. S. 318, 34 S. Ct. 596, 58 L. Ed. 980; 25 C. J. 1178, Sec. 72.

"When tested by these rules, it will appear that this provision of Section 14, Chapter 255, Laws of 1936, is not remedial but imposes a penalty."

It is submitted that, when the present statute is tested by the same rules, it is likewise penal. We call special attention to the case of *Mengel Co.* v. *Ishee*, (decided by the Mississippi Supreme Court, December 8, 1941) and reported in 4 So. 2d 878, in which Judge Anderson, expressing his own views and not that of the majority of the court, made the following statement:

"The writer of this opinion, however, does not agree that there is concurrent jurisdiction and on account of the importance of the question is constrained to state his views. In the first place the 100 percent 'liquidated damages' provided for in the Wage and Hour Law is a penalty and not damages. The name given it by the statute does not control, but instead the nature of the recovery. In other words, naming it 'liquidated damages' does not settle the question. *Goodstein* v. *Board of Levee Commissioners*, 153 Miss. 783, 122 So. 856; *Helwig* v. *United States*, 180 U. S. 605, 23 S. Ct. 427, 47 L. Ed. 614; *First National Bank* v. *Morgan*, 132 U. S. 141, 10 S. Ct. 37, 38, 33 L. Ed 282; and 21 R. C. L. 210."

The question now before the court is not that of whether the provisions of the Wage and Hour Law constitute a penalty in the sense that jurisdiction would be exclusive in the Federal Court, but the question is

whether it constitutes a penalty in the sense used by the Mississippi statute of limitations and we believe the case of *State* v. *Newton*, *supra*, would be conclusive on this subject.

In this connection we call the court's attention to the fact that the very heading adopted by Congress for Section 216, is Penalty; Civil and Criminal Liability. Most certainly the fine to be imposed would be a criminal penalty or a criminal liability, and the double damages and attorneys' fees are in the nature of a civil penalty.

Counsel for plaintiff have cited quite a few cases in which it is contended that the courts have decided that the civil provisions of Section 216 are not penalties. However, all of these cases are based upon the question of the jurisdiction of the court and more especially as to whether a state court would have jurisdiction.

Congress had previously reserved jurisdiction to the Federal Court of all cases to enforce federal penalties, 28 U. S. C. A., Secs. 780 and 788. By specifically providing in Sec. 216 of 29 U. S. C. A. that action under the Wage and Hour Law might be heard in either a federal or a state court, it necessarily conferred jurisdiction upon the state court to hear such causes, regardless of whether the same be a penalty or not. Therefore, it is not necessary to determine whether a penalty is provided for in Section 216 in determining the jurisdiction of the Court. Congress had the authority to confer jurisdiction upon the state court in matters of this kind whether it be a penalty or not, and Congress has said that such jurisdiction is conferred, and therefore decisions dealing with the question of penalties in jurisdictional matters is merely dicta and not necessary to the decision of the questions involved.

In the case of *Stringer* v. *Griffin Grocery Co.*, (Tex. Ct. Civ. App.) 149 S. W. 2d 158, the court states this in the following language:

"It is urged that section 216(b) provides a penalty to a party aggrieved, denominated 'liquidated damages' thus the suit thereunder must, in accordance with 28 U. S. C. A., p. 371, be maintained in a Federal district court. We do not so regard it. * * * however, it can be said that the Act of Congress awards a penalty to the parties aggrieved, and specifies the remedy for its enforcement in a court of competent jurisdiction as in a civil action, it may be enforced in a state court. *Claflin* v. *Houseman*, 93 U. S. 130, 23 L. Ed. 833; *Pennsylvania Dixie Cement Corp.* v. *H. Wales Lines Co.*, 119 Conn. 603, 178 Atl. 659; 15 C. J. 1159, Note 30, 21 C. J. S., Courts, 526; *Campbell* v. *Superior Decalomania Co., Inc.*, (C. C. Tex.) 31 Fed. Supp. 633; *Robertson* v. *Argus Hosiery Mills*, (D. C. Tenn.) 32 Fed. Supp. 19. It is therefore the right of the employee to prosecute his suit in any court of competent jurisdiction, Federal, territorial or state, and when once attached, the right may be asserted in that court, although other courts may also have jurisdiction of the cause. * * *"

In the case of *Adair* v. *Traco Division*, 192 Ga. 59, 14 S. E. 2d 466, the Supreme Court of Georgia again explains that the decisions dealing with this question are related exclusively to jurisdictional questions and do not determine generally whether the action calls for a penalty. This case is stated in the following language:

"Bell, Justice. According to the reasoning in several decisions by the United States Supreme Court, the words 'penalties and forfeitures,' as used in U. S. Judicial Code, Sec. 256, as amended, U. S. C. A., Title 28, Sec. 371, *supra*, 'refer to something imposed in a punitive way for an infraction of a public law, and do not include a liability imposed for the purpose of redressing a private injury, even though the wrongful act be a public offense and punishable as such.' *Meeker* v. *Lehigh Valley Railroad Co.*, 236 U. S. 412, 423, 35 S. Ct. 328, 332; 59 L. Ed. 644, Ann. Cas. 1916B, 691. While the fair labor standards act was professedly designed for the public good as related to interstate commerce, a suit for the 'additional equal lia-

bility as liquidated damages' is an action to redress a private injury, and the relief sought would, under the decision just cited, be 'not punitive, but strictly remedial.' See also *Huntington* v. *Attrill*, *Chattanooga Foundry & Pipe Works* v. *Atlanta*, 203 U. S. 390, 397, 27 S. Ct. 65, 51 L. Ed. 241. Whether the additional sum recoverable as 'liquidated damages' be in fact a penalty though not so called, yet since it was characterized as liquidated damages by the same law-making body which enacted the provision as to exclusive jurisdiction of suits for penalties and forfeitures, we must conclude that it cannot be considered as a penalty within the meaning of the statute conferring exclusive jurisdiction upon the Federal courts 'of all suits for penalties and forfeitures incurred under the laws of the United States,' and that the phrase 'and court of competent jurisdiction' would include a State court. For other decisions in which the same conclusion has been reached, see *Hart* v. *Gregory*, 218 N. C. 184, 10 S. E. 2d 644, 130 A. L. R. 265; *Tapp* v. *Price-Bass Co.*, (Tenn. Sup.) 147 S. W. 2d 107, decided February 1, 1941; *Emerson* v. *Mary Lincoln Candies, Inc.*, 173 Misc. 513, 17 N. Y. S. 2d 851; *Terner* v. *Glickstein & Terner*, 283 N. Y. 209, 28 N. E. 2d 846; *Stringer* v. *Griffin Grocery Co.*, (Tex. Civ. App.) 149 S. W. 2d 158, February 8, 1941. And see articles on this subject in Michigan Law Review for January, 1941, and in 27 Virginia Law Review 328."

It might be noted in passing that the Georgia court of appeals held the provision of the Wage and Hour Law to constitute a penalty. See the case of *Anderson* v. *Meacham*, 62 Ga. App. 145, 8 S. E. 2d 459:

"The fact that the employee may bring his action for an additional equal amount as liquidated damages is nothing more or less than a penalty fixed and incurred under the law of the United States. We think the employee in this case, having elected to bring his action for a penalty as is provided by the act, is restricted to the United States court for his relief and that the demurrer as to this ground was properly sustained. See *Helwig* v. *United States*, 188 U. S.

605, 23 S. Ct. 427, 47 L. Ed. 614; *Pacific Mail Steamship Company* v. *Schmidt*, 241 U. S. 245, 36 S. Ct. 581, 60 L. Ed. 982; *Collie* v. *Ferguson*, 281 U. S. 52, 50 S. Ct. 189, 74 L. Ed. 696; *O'Sullivan* v. *Felix*, 233 U. S. 318, 34 S. Ct. 596, 58 L. Ed. 980; *Southern Ry. Co.* v. *Inman, Akers & Inman*, 11 Ga. App. 564, 75 S. E. 908."

The term "penalty" is a very elastic term and has been given various and sundry meanings, depending upon the sense in which the same has been used. Some of the decisions which the appellant relies upon have referred to "penalty" in the sense of a fine or punishment accruing to the state or nation and have held that any amount accruing to an individual is not a penalty, regardless of whether it be awarded as damages or be inflicted as punishment. This is entirely too narrow a view of the word "penalty" and we submit that in the common and usual acceptation of the word "penalty" that it covers not only fines and forfeitures, but civil liabilities inflicted by way of punishment.

See Words & Phrases on the word, "penalty," from which it will appear that the word "penalty" is properly used in a narrower sense, "exacted as punishment for a civil wrong," and a "penalty" is an agreement to pay a greater sum to secure the payment of a less sum.

We respectfully submit that the action was penal in nature and barred by the one-year Mississippi statute of limitations.

We respectfully submit that the application for certiorari should be denied.

Respectfully submitted,

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Certificate.

The undersigned William H. Watkins, of counsel for the respondent in the above styled and numbered cause, hereby certifies that a true and correct typed copy of the foregoing brief has been this day forwarded by United States mail, postage prepaid, to Honorable Charles Ingle, Attorney at Law, Natchez, Mississippi, attorney of record for petitioner.

This 23rd day of August, 1943.

WILLIAM H. WATKINS.